STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 1, 2007
v JAMES HATCHETT, Defendant-Appellant	No. 265238 Wayne Circuit Court LC No. 05-005450-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v JACARL HARLAN, Defendant-Appellant.	No. 265241 Wayne Circuit Court LC No. 05-004643-01

Before: Whitbeck, C.J., and Murphy and Cooper, JJ.

PER CURIAM.

In these consolidated appeals, defendants appeal as of right from their convictions by jury arising out of a drive-by shooting. In Docket No. 265238, defendant Hatchett appeals his convictions of one count of assault with intent to do great bodily harm, MCL 750.84, four counts of felonious assault, MCL 750.82, and one count each of possession of a firearm during the commission of a felony, MCL 750.227b, and felon-in-possession, MCL 750.224f. In Docket No. 265241, defendant Harlan appeals his convictions of four counts of assault with intent to do great bodily harm, MCL 750.84. Both defendants were sentenced as fourth habitual offenders, MCL 769.12. We affirm.

On the evening of June 29, 2005, Crystal Cowan was driving with her boyfriend, Roosevelt Pettiford, his son Martinez, age 11, and her two small children. When Pettiford saw his friend Mike arguing with defendant Hatchett (a/k/a "Glover") on the street, Pettiford told Cowan to pull over. Pettiford left the car and tried to stop the argument. Defendant Harlan (a/k/a "J.C.") exited a parked van, approached the others, and attempted to stop the argument.

During the argument, Hatchett told Pettiford that he was tired of people disrespecting him and that "he better get his boy [Mike] before he kill him." Harlan and Hatchett then returned to the van and drove away. Pettiford returned to Cowan's car, a rented convertible with the top down and the windows up. Cowan drove to a house around the block where Pettiford exited. She then proceeded with the children to her grandmother's house.

On the way, Cowan pulled over to the side of the road to secure one of the children into a child seat. While Cowan was stopped, a car driven by Harlan with Hatchett sitting in the passenger seat drove up next to Cowan's car. Hatchett pulled out a black semi-automatic handgun and fired a shot at the driver's door of Cowan's car. Cowan reversed the car to flee the assault by backing down the street. Harlan also reversed his car to pursue Cowan. As Harlan and Hatchett again approached Cowan's car, Hatchett fired a second shot that hit the driver's side front window and a third shot that hit the front diver's side tire. Harlan and Hatchett then drove off. After the tire was changed, Cowan drove to the police station.

At the police station, Cowan spoke with police officer Raytheon Martin at the front desk and provided him with the names of "Glover" and "J.C." as her alleged assailants. Cowan then identified two photographs as "Glover" and "J.C.," i.e., Hatchett and Harlan.

Hatchett and Harlan were arrested. Hatchett was charged with four counts each of assault with intent to murder, assault with intent to do great bodily harm, felonious assault, and one count each of felon-in-possession and felony-firearm. Harlan was charged with four counts each of assault with intent to murder and of assault with intent to do great bodily harm.

At a pretrial conference, about a month before trial, Harlan orally moved to substitute his appointed defense counsel. The trial judge interrupted Harlan without hearing his reasons and informed him that he could hire his own attorney but that his appointed counsel was a good attorney. Harlan's appointed counsel was not substituted.

At trial, Cowan was the principal witness for the prosecution and essentially testified to the events as related above. Cowan testified that she heard Hatchett tell Pettiford that he (Hatchett) was tired of people disrespecting him, and that Pettiford had "better get his boy [Mike] before [I] kill him." Hatchett's defense counsel objected, arguing that Hatchett's statement was not an admission but was inadmissible hearsay. The trial judge allowed it as an admission by a party opponent.

Neither Hatchett nor Harlan testified at trial. Counsel for Hatchett and Harlan essentially argued to the jury that there was insufficient evidence that the incident even occurred, that Cowan's allegations were inconsistent, unreliable, and uncorroborated, and that even if the incident occurred, there was insufficient evidence that they assaulted Cowan and the children with the requisite intent to murder them or to commit great bodily harm.

Hatchett and Harlan were convicted as described above. Both defendants were acquitted of all counts of assault with intent to murder, MCL 750.83.

Harlan moved for post-conviction relief based on the failure of his defense counsel to interview Martinez Pettiford, the 11-year-old passenger, and asked for an evidentiary hearing and for assistance from the prosecutor in locating Martinez. The trial judge denied the motion

finding that defense counsel was aware of Martinez as a victim and potential res gestae witness and, as a matter of trial strategy, reasonably decided not to call Martinez.

On appeal, Hatchett first contends that his convictions of both assault with intent to do great bodily harm and felonious assault violated his double jeopardy rights protecting him against multiple punishments. We disagree.

Hatchett did not raise this issue below. An unpreserved claim that a defendant's double jeopardy rights have been violated is reviewed for plain error that affected defendant's substantial rights, i.e., the error affected the outcome of the lower court proceedings. *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005). Furthermore, reversal is appropriate only if the plain error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

The prohibition against double jeopardy in both the federal and state constitutions protect against (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004).

There is no double jeopardy violation if one crime is complete before the other occurs, even if the offenses share common elements or one is a lesser included offense of the other. *People v Ford*; 262 Mich App 443, 459; 687 NW2d 119 (2004); *People v Colon*, 250 Mich App 59, 63; 644 NW2d 790 (2002); *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995) ("Because the act resulting in the felonious assault conviction was complete before the act leading to the assault with intent to do great bodily harm occurred, there is no violation of double jeopardy protections."). However, if criminal conduct is presented as a continuing sequence of events that culminate in an offense, such as an armed robbery that results in a death, conviction of both armed robbery and felony murder would be improper. *People v Bulls*, 262 Mich App 618, 629; 687 NW2d 159 (2004).

In this case, the record indicates that Hatchett fired three shots. The first shot struck the driver's door of Cowan's car as Harlan drove alongside it. After the first shot, Cowan drove her car away in reverse to avoid any further assault. As Harlan pursued Cowan, Hatchett then fired a second shot that hit the driver's side front window and a third shot that hit the front driver's side tire. Even though these three shoots occurred within a short period of time, the first shot was separated in both time and space from the second and third shots. The first shot was, therefore, a completed separate criminal offense that occurred before Hatchett fired the second and third shots. Accordingly, under *Ford*, *Colon*, and *Lugo*, no multiple punishment violation of Hatchett's double jeopardy protections occurred.

Next, Hatchett claims that the trial court erred in admitting through Cowan's testimony his statement to Pettiford that he would kill Mike. Hatchett claims that his statement was not an admission against interest because it was not inconsistent with any position he adopted on a contested issue at trial. He further contends that the statement was hearsay, irrelevant, unfairly prejudicial, and that it should have been excluded under MRE 404b. Moreover, he argues that this error was not harmless because the prosecutor's case was weak. We disagree.

The admission of evidence is reviewed for an abuse of discretion. *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001). "However, decisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence[,]" and such questions are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

At trial, Hatchett's attorney objected to the admission of Hatchett's statement on the basis of hearsay, not on the bases of relevance or unfair prejudice. An admission by a party defendant is not hearsay. *People v Kowalak (On Remand)*; 215 Mich App 554, 556-557; 546 NW2d 681 (1996). MRE 801(d)(2)(A) provides:

> (d) A statement is not hearsay if–
>
> * * *
>
> (2) The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, except statements made in connection with a guilty plea to a misdemeanor motor vehicle violation or an admission of responsibility for a civil infraction under laws pertaining to motor vehicles[.]

In this case, Hatchett's statement that he was "tired of people disrespecting him" and that Pettiford "better get his boy [Mike] before he kill him" was his own statement made in his own individual capacity and not made in connection with a guilty plea or admission of civil responsibility. Therefore, under MRE 801(d)(2)(A), Hatchett's statement was an admission, and not hearsay.[1]

Because Hatchett's attorney objected to the admission of his statement on the basis of hearsay and not relevance or unfair prejudice, these arguments were not preserved for appeal. Nevertheless, even if Hatchett had raised these arguments, he would not be entitled to relief. First, events do not occur in a vacuum but are integrally connected with antecedent events from which the event in question proceeds. A jury is usually entitled to learn the complete story to understand the full context in which disputed events took place. *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996). Hatchett's statement was admissible as part of the extended res gestae of the assault on Cowan and the children and provided a full picture of the facts at trial for the jury. Second, the admission of evidence is not a basis for reversal unless the error affected a defendant's substantial rights in that the error was outcome determinative. *People v Houston*, 261 Mich App 463, 466; 683 NW2d 192 (2004), aff'd 473 Mich 399 (2005). The admission of Hatchett's statement was not outcome determinative in light of Cowan's positive identification of Hatchett, who she said that she had known from her neighborhood for several years, as her assailant.

---

[1] Aside from the clear admissibility under MRE 801(d)(2)(A), we also note that, to the extent that any portion of the statement was being introduced to prove the truth of the matter asserted, the statement would likely be admissible as an exception to hearsay under MRE 803(3) ("A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition[,] such as intent, plan, motive, design, mental feeling, pain, and bodily health[.]").

Finally, Hatchett claims that the prosecutor improperly informed the jury of her personal belief in his guilt and that the jury could have suspended its independent judgment and simply adopt her personal belief. He also asserts that his defense counsel was ineffective for not objecting to the prosecutor's statements. We disagree.

Because defendant failed to preserve this issue by objecting to the prosecutor's argument, and outside the context of the ineffective assistance claim, this Court will review it only to determine whether there was plain error that affected defendant's substantial rights. *People v Goodin*, 257 Mich App 425, 431-432; 668 NW2d 392 (2003). "'Reversal is warranted only when the error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.'" *Id*. at 432, quoting *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

A prosecutor may argue all reasonable inferences from the evidence relating to the theory of prosecution. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). However, a prosecutor may not invoke the prestige of the office or suggest that he or she has special knowledge regarding the veracity of witnesses. *Bahoda, supra* at 276; *People v Matuszak*, 263 Mich App 42, 54; 687 NW2d 342 (2004).

From our review of the record, we find that the prosecutor argued the evidence of Hatchett's guilt. Although the prosecutor used self-referential phrasing in her closing argument such as, "Now, I submit to you that I've proven my burden for the felony-firearm charge as relates to James Hatchett, Glover here" and "But I submit to you that I have enough [evidence]," she did not argue her personal belief in defendant's guilt. Nor did she claim that she had any special knowledge, unknown to the jury, apart from what the evidence demonstrated. Accordingly, the prosecutor's argument was not improper.

Because the prosecutor' argument was not improper, Hatchett's defense counsel was not ineffective for not objecting. A defense counsel is ineffective if that counsel's performance is objectively unreasonable and results in a reasonable probability that, but for the error, the result of the proceeding would have been different. *People v Hill*, 257 Mich App 126, 138-139; 667 NW2d 78 (2003). Because the prosecutor's closing argument was not improper, defense counsel was not objectively unreasonable for not objecting and, therefore, not constitutionally ineffective. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Defendant Harlan contends that the trial court abused its discretion when it failed to fully hear his reasons for requesting new trial counsel and determine whether appointed counsel was performing adequately or whether the attorney-client relationship had broken down.

We review the denial of a motion to substitute appointed counsel for an abuse of discretion. See *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005).

Under the federal and state constitutions, an indigent defendant is guaranteed the right to counsel. US Const, Am VI; Const 1963, art 1, § 20. However, after counsel is appointed, an indigent defendant is not entitled to substitution of the attorney simply upon request. *Bauder, supra* at 193. Rather, substitution is warranted only if good cause is shown and if substitution will not unreasonably disrupt the judicial process. *Id.* Good cause exists when a legitimate

difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. *People v Williams*, 386 Mich 565, 574; 194 NW2d 337 (1972); *Bauder, supra* at 193; *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).

When a defendant asserts that his assigned attorney is not adequate or diligent, or is disinterested, the trial court should hear the defendant's claim and, if there is a factual dispute, take testimony and state its findings and conclusion on the record. *People v Ginther*, 390 Mich 436, 441-442; 212 NW2d 922 (1973); *Bauder*, *supra* at 193.

In this case, Harlan asked that his appointed counsel be allowed to step down, but did not formally request that new counsel be appointed to assist him. Moreover, when the trial court advised Harlan that he could hire an attorney in place of the court-appointed counsel, he replied, "Okay." Harlan never stated that he was financially unable to hire another attorney and that he needed another appointed counsel. Assuming that Harlan's request that counsel be allowed to step down contained an implicit request for the appointment of new counsel, defendant did not proffer reasons establishing good cause for the substitution. Granted, the trial court interrupted Harlan as he was beginning to explain his unhappiness with appointed counsel, but he never attempted to explain why substitute counsel was necessary even though he had several later opportunities to address the court. Under the circumstances, we hold that the trial court was not obliged under *Ginther* and *Bauder* to schedule a hearing on whether Harlan had good cause to request substitute appointed counsel. Harlan had to do more than simply request that his appointed counsel be allowed to step down.

Furthermore, to this date, Harlan has not shown good cause to obtain the appointment of new counsel. He has not submitted an affidavit detailing either a conflict between himself and his attorney over basic trial strategy or tactics or the inadequacy of appointed counsel so as to demonstrate the need for a hearing to establish a record on this issue. In the absence of any such showing, there is no reason to direct a hearing now. Finally, we would note that defense counsel secured Harlan's acquittal on the four most serious counts of assault with intent to murder. It seems unlikely that Harlan could establish the good cause necessary to obtain substitute counsel.

Next, Harlan argues that the testimony of officer Martin violated his right to confrontation because out-of-court testimonial statements by a witness are excluded unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness, even where the trial court considers the testimony reliable. *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Harlan maintains that officer Martin was effectively unavailable because he had no independent memory of the report due to a head injury and that he did not have an opportunity to cross-examine officer Martin on the report before he lost his memory. Harlan also argues that Martin's testimony was inadmissible because, having no memory of the event, he could not lay a proper foundation to allow reliance on the report. Further, Harlan contends that counsel was ineffective in failing to object to the testimony.

The federal constitutional right to confrontation bars the admission of testimonial statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness. *Crawford, supra* at 68; *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005); *People v Lonsby*, 268 Mich App 375, 377; 707 NW2d 610 (2005). A statement is testimonial when made as a formal declaration

to government officers for the purpose of establishing a fact, and such statements include affidavits, depositions, prior testimony, and confessions. *Crawford, supra* at 51-52. Evidence admitted in violation of the constitutional right to confront witnesses may be harmless error if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty even absent the error. *Shepherd, supra* at 347-348.

In this case, assuming that there was error in admitting the testimony, the admission of the testimony of officer Martin as to Cowan's statement to the police was harmless error and did not prejudice Harlan because Martin did not testify about anything substantive in the report. Martin testified that the color of Cowan's car was red but was uncertain whether he saw the car or whether Cowan told him the color because he did not have an independent recollection of the contents of the report after he suffered a head injury. The bulk of Martin's testimony essentially explained the process involved in preparing a report. Based on the record, it is clear beyond a reasonable doubt that the jury verdict would have been the same absent officer Martin's testimony relating to the report. There was no plain error affecting Harlan's substantial rights, i.e., no prejudice, *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999), and, with respect to the claim of ineffective assistance of counsel, Harlan has failed to show a reasonable probability that, but for counsel's error, the verdict would have been different, *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Finally, Harlan argues that his defense counsel was ineffective because he did not interview Martinez Pettiford, the 11-year-old passenger in Cowan's car, to determine if the boy saw Harlan driving the other car. Harlan contends that this deprived him of a possible substantial defense because only Cowan testified that he drove the car and that no other res gestae witnesses, including Martinez, were interviewed who might have been able to challenge Cowan's identification. Harlan also argues that the trial court abused its discretion in denying his request for reasonable assistance in locating the res gestae witness. Moreover, Harlan maintains that the trial court misinterpreted the law of ineffective assistance of counsel because a defense counsel's failure to investigate and interview promising witnesses is negligence and not trial strategy when the defense counsel has no reason to believe that the witnesses would not be valuable for the defense.

Harlan preserved these issues by filing a post-conviction motion for assistance in locating a res gestae witness and for an evidentiary hearing on ineffective assistance of defense counsel. A trial court's decisions on a request for assistance in locating a witness and for an evidentiary hearing on ineffective assistance of counsel are reviewed for an abuse of discretion. See *People v Burwick*, 450 Mich 281, 298; 537 NW2d 813 (1995).

In *Carbin, supra* at 599-600, our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel

> was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Counsel's decision whether to call a witness is presumed to be a strategic one for which a court will not substitute its judgment. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Nevertheless, ineffective assistance of counsel can arise from the failure to call a witness or present other evidence, but only if the failure deprived the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A defense is substantial if it might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526-527; 465 NW2d 569 (1990).

In this case, the primary defense strategy was to challenge the credibility of Cowan, the prosecution's principal witness. Although defense counsel knew about Martinez, the record does not show that he interviewed the boy. Nevertheless, we hold that defense counsel's failure to call Martinez as a witness was not objectively unreasonable. Whatever the content of Martinez's testimony, it would be problematic for Harlan as a matter of trial strategy. The record indicates that all the children were afraid, screaming, and ducking down onto the floor and backseat during the gunfire. Hence, even if Martinez was called to testify and had stated that he did not see Harlan, the prosecution could have explained that this was because the boy feared for his life and he had failed to notice Harlan because he was ducking for cover to avoid being shot. Moreover, the appearance of Martinez as a witness and child victim of an alleged assault by Harlan would naturally arouse sympathy in the jury for Martinez and against Harlan. Thus, defense counsel had a reasonable basis for not pursuing Martinez. Furthermore, even favorable testimony from Martinez would not have created a substantial defense because there is no reasonable probability that the result of the proceeding would have been different given Cowan's testimony. Cowan testified that she knew Harlan from the neighborhood for ten years and that Harlan was the driver of the car. However, Martinez was a scared 11-year-old child who ducked down onto the floor of the car to avoid the gunfire. Ineffective assistance of counsel has not been established, nor did the court abuse its discretion in denying the request for assistance in locating Martinez.[2]

Affirmed.

/s/ William C. Whitbeck
/s/ William B. Murphy
/s/ Jessica R. Cooper

[2] Under the procedural circumstances of this case, we disagree with Harlan that MCL 767.40a required the court to direct the prosecution to provide assistance in locating Martinez.